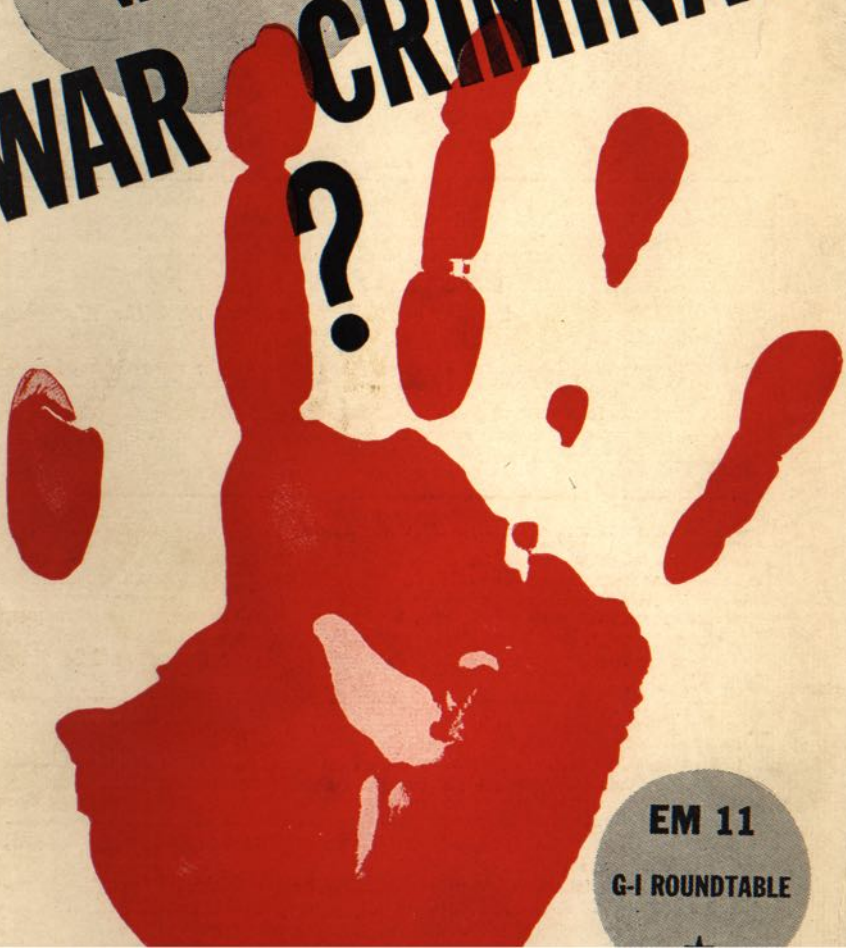
W1.55:11

DEC 3 - 1945

LIBRARY
UNIVERSITY OF RICHMOND
VIRGINIA

# WHAT SHALL BE DONE WITH THE WAR CRIMINALS?



EM 11

G-I ROUNDTABLE

Prepared for

THE UNITED STATES ARMED FORCES

by

**THE AMERICAN HISTORICAL ASSOCIATION**

This pamphlet is one of a series made available by the War Department under the series title *GI Roundtable*. As the general title indicates, *GI Roundtable* pamphlets provide material which information-education officers may use in conducting group discussions or forums as part of an off-duty education program, and which operators of Armed Forces Radio Service outlets may use in preparing GI Radio Roundtable discussion broadcasts.

The content of this pamphlet has been prepared by the Historical Service Board of the American Historical Association. Each pamphlet in the series has only one purpose: to provide factual information and balanced arguments as a basis for discussion of all sides of the question. It is not to be inferred that the War Department endorses any one of the particular views presented.

*Specific suggestions for the discussion or forum leader who plans to use this pamphlet will be found on page 40.*

WAR DEPARTMENT

WASHINGTON 25, D. C., 2 August 1944

[AG 300.7 (2 Aug 44).]

EM 11, *GI Roundtable: What Shall Be Done With the War Criminals?*

Current War Department instructions authorize the requisition of additional copies of this pamphlet for use by military personnel on the basis of two to a company or similar organization. Additional copies should be requisitioned from USAFI, Madison 3, Wisconsin, or nearest Oversea Branch.

Distributed for use in the educational and informational programs of the Navy, Marine Corps, and Coast Guard. This distribution is not to be construed as an endorsement by the Navy Department of the statements contained therein.

---

EDUCATIONAL SERVICES SECTION, STANDARDS AND CURRICULUM DIVISION, TRAINING, BUREAU OF NAVAL PERSONNEL, WASHINGTON 25, D. C.

(Copies for Navy personnel are to be requisitioned from Educational Services Section.)

---

EDUCATION SECTION, WELFARE DIVISION, SPECIAL SERVICES BRANCH, UNITED STATES MARINE CORPS, WASHINGTON 25, D. C.

(Distributed to Marine Corps personnel by Special Services Branch. Additional copies or information may be obtained from unit Special Services Officers.)

---

TRAINING DIVISION, OFFICE OF PERSONNEL, COAST GUARD HEADQUARTERS, WASHINGTON 25, D. C.

(Copies for Coast Guard personnel should be requisitioned from the Commandant (PT), U. S. Coast Guard Headquarters, Washington 25, D. C.)

# CONTENTS


**WHO ARE THE WAR CRIMINALS?** ..... 2

**THE RULES OF WARFARE AND THEIR VIOLATION** ..... 5
Offenses against Belligerents ..... 6
Offenses against Civilians ..... 10

**WHAT HAPPENED AFTER THE LAST WAR?** ..... 13
The Versailles Treaty ..... 14
The Lists of Accused ..... 15
The Leipzig Trials ..... 16
Lessons of Leipzig ..... 18

**UNDER WHAT LAWS SHALL THE UNITED NATIONS PROCEED?** ..... 19

**TRIAL BY LOCAL COURTS** ..... 23

**TRIAL BY INTERNATIONAL TRIBUNALS** ..... 25
How Would This Court Be Staffed? ..... 27

**ARE "SUPERIOR ORDERS" A LEGITIMATE DEFENSE?** ..... 27
An Early Precedent ..... 29
The American View ..... 29
The English View ..... 30
The German View ..... 31
A Suggested Rule ..... 31

**ARE CHIEFS OF STATE LIABLE?** ..... 32

**GETTING HOLD OF THE ACCUSED** ..... 35
The Right to Give Asylum ..... 36
Plugging Up the Loopholes ..... 36

**HOW SHALL THE GUILTY BE PUNISHED?** ..... 38

**TO THE LEADER** ..... 40

**SUGGESTIONS FOR FURTHER READING** ..... 44

## FROM A STATEMENT BY PRESIDENT ROOSEVELT, PRIME MINISTER CHURCHILL, AND PREMIER STALIN ISSUED AT MOSCOW, NOVEMBER 1, 1943

THE United Kingdom, the United States and the Soviet Union have received from many quarters evidence of atrocities, massacres and cold-blooded mass executions which are being perpetrated by Hitlerite forces in many of the countries they have overrun and from which they are now being steadily expelled. . . .

"Accordingly, the aforesaid three Allied Powers, speaking in the interests of the thirty-three United Nations, hereby solemnly declare and give full warning of their declaration as follows: At the time of granting of any armistice to any government which may be set up in Germany, these German officers and men and members of the Nazi Party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be erected therein. Lists will be compiled in all possible detail from all these countries, having regard especially to invaded parts of the Soviet Union, to Poland and Czechoslovakia, to Yugo-

★

slavia and Greece including Crete and other islands, to Norway, Denmark, Netherlands, Belgium, Luxembourg, France and Italy.

"Thus, Germans who take part in wholesale shooting of Polish officers or in the execution of French, Dutch, Belgian or Norwegian hostages or of Cretan peasants, or who have shared in slaughters inflicted on the people of Poland or in territories of the Soviet Union which are now being swept clear of the enemy, will know they will be brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged. Let those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied Powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done.

"The above declaration is without prejudice to the case of German criminals, whose offenses have no particular geographical localization and who will be punished by joint decision of the Governments of the Allies."

★

# WHAT SHALL BE DONE WITH THE WAR CRIMINALS?

THE vigorous Moscow Statement by President Roosevelt, Prime Minister Churchill, and Premier Stalin on atrocities has been widely discussed and debated. Few people question the right of the United Nations to bring the war criminals to trial and to punish them. But many problems will arise when this difficult job is begun.

What is a war crime and who are the war criminals? In what courts shall the accused be tried? By what laws? What punishments shall be meted out to them?

To each of these and related questions there are many possible answers. And, if we may judge by the experience of the first World War, there may not be entire agreement among the people of the United Nations. The following discussion, therefore, is an attempt to explore but not prejudge the problems that will come up in trying to deal with the war criminals and in bringing them to the bar of justice.

Let us assume that the armies of the United Nations, having crushed enemy resistance, have marched into Germany, Japan, and other Axis countries. They have taken into custody all the enemy leaders, both political and military, on whom they can lay their hands. These may include Hitler, Goering, Goebbels, Tojo, Mussolini, the general staffs of the German and Japanese armies together with the naval leaders, and the Gestapo chiefs. The catch will in-

clude the local quislings and others who have committed, or ordered committed, the inhuman crimes we have all read about. What shall be done with them? How shall we do justice and yet not make martyrs of them?

Many people have a ready answer — "Shoot 'em or string 'em up!" But this kind of action is not consistent with our aims, nor with those of our Allies. It is true that a victorious power can impose upon a defeated power such terms as it wants to, restrained only by its concern for the judgment of history and its regard for the principles of international law. Looked at in this way, the problem of what to do with Axis war criminals is essentially a problem of policy and expediency rather than of legal technicality. But the United Nations are determined to restore law and order and a civilized way of life to lands now under Axis tyranny. By shooting or hanging even the most notorious of war criminals without legal trial, we and our Allies would be charged with sinking to the barbaric level of our enemies.

In civilized countries even a killer caught with a smoking gun in his hand is entitled to a fair trial. The laws and customs to which all civilized states adhere require that a man who commits a crime be tried in an orderly legal way and given an opportunity to defend himself.

## WHO ARE THE WAR CRIMINALS?

Before we can consider how and where to bring the war criminals to justice, and what punishments to administer, we must determine who they are.

Considering the Axis views and conduct of "total war," war criminals can legitimately be defined, according to some authorities, as persons, regardless of political or military rank, who during the war in their official capacity have committed acts which violated (a) the laws and customs of legitimate warfare or (b) the principles of

criminal law that are generally observed in civilized legal systems, or who have ordered, consented to, or conspired in the commission of such acts.

This definition, we must note, does not include three types of crime and criminals which many people associate with war—especially with this war:

First, the crime of violating a solemn treaty signed between nations or of starting a war of aggression. No agreement has been reached among nations, nor rules of law set down, for punishing treaty violators, either in national or international courts—though such rules were recommended to the Preliminary Peace Conference at the close of World War I.

Second, crimes, such as theft, rape, or murder, committed by soldiers, sailors, or marines on their own initiative and not in connection with military operations. Men accused of these crimes may be tried by national tribunals, either military or civil.

Third, the treason of government officials or party leaders, such as Pierre Laval of France or Vidkun Quisling of Norway, who helped deliver up their countries to the enemy. Treason is a crime with which the courts of each country, not outside tribunals, are properly suited to deal.

So much for what the definition does not include. It does include, however, three types of persons who may not be regarded as war criminals by some authorities:

First among these are officers or officials who, according to the Moscow Statement, took "a consenting part in," that is, had the power and authority to prevent the atrocities, massacres, and executions, but failed to stop them.

Second, the definition includes not only military leaders but political chieftains. Under Germany's conception of "total war" there is little difference between the cruelties of the Gestapo (the civilian undercover police), the notorious "S.S." (the Nazi Party's private army to keep the German people in check), and "Death Head" guards at concentration camps, and the cruelties of strictly

"On August 21 I said that this Government was constantly receiving information concerning the barbaric crimes being committed by the enemy against civilian populations in occupied countries, particularly on the continent of Europe. I said it was the purpose of this Government, as I knew it to be the purpose of the other United Nations, to see that when victory is won the perpetrators of these crimes shall answer for them before courts of law.

"The commission of these crimes continues.

"I now declare it to be the intention of this Government that the successful close of the war shall include provision for the surrender to the United Nations of war criminals.

"With a view to establishing responsibility of the guilty individuals through the collection and assessment of all available evidence, this Government is prepared to cooperate with the British and other Governments in establishing a United Nations Commission for the Investigation of War Crimes.

"The number of persons eventually found guilty will undoubtedly be extremely small compared to the total enemy populations. It is not the intention of this Government or of the Governments associated with us to resort to mass reprisals. It is our intention that just and sure punishment shall be meted out to the ringleaders responsible for the organized murder of thousands of innocent persons and the commission of atrocities which have violated every tenet of the Christian faith." (President Roosevelt, October 7, 1942.)

military officers. Perhaps the former can be more appropriately tried, however, for violations of ordinary common and statutory criminal law than for acts contrary to the laws and customs of legitimate warfare.

Finally, the definition includes businessmen and industrialists of prestige and power who indirectly participated in or conspired to commit crimes, especially those who shared, often by prearrangement, in the loot of countries overrun by the Axis armies. This group might include officials of the I. G. Farben, Goering, Krupp, Thyssen, and Mannesmann trusts in Germany and the Mitsui and other Japanese business clans. These officials, as principals, accessories, or conspirators, might be tried for robberies and thefts actually committed by the military and political leaders.

## THE RULES OF WARFARE AND THEIR VIOLATION

The nations of the world, including our enemies, have at different times signed treaties governing the conduct of war and outlawing certain kinds of behavior by the forces of the belligerents. The most relevant sources of this written law are (1) the Hague Convention of 1899 relating to the laws and customs of war on land; (2) a revision and extension of this issued in 1907; (3) a convention regulating the treatment of prisoners of war; and (4) a Red Cross convention regarding the treatment of wounded and sick members of armies in the field. The last two were signed in Geneva in 1929.

In addition, certain kinds of behavior are prohibited not only by these international agreements but by the customary or common law of warfare as well. The provisions of the conventions (written law) and also many of the provisions of the common law of warfare (unwritten law) are embodied in the military manuals of civilized states. For the American Army, the relevant law is contained in FM 27–10, *Rules of Land Warfare,* which summarizes the violations of the laws and customs of warfare most frequently involved, as follows:

669444° 45 — 2

"Offenses by armed forces.—The principal offenses of this class are: Making use of poisoned and otherwise forbidden arms and ammunition; killing of the wounded; refusal of quarter; treacherous request for quarter; . . . ill-treatment of prisoners of war; . . . firing on undefended localities; . . . misuse of the Red Cross flag and emblem . . . ; bombardment of hospitals and other privileged buildings; improper use of privileged buildings for military purposes; poisoning of wells and streams; pillage and purposeless destruction; ill-treatment of inhabitants in occupied territory." (Paragraph 347, FM 27–10.)

Some of these offenses (for example, refusal of quarter) can only be military crimes, but ill-treatment of inhabitants in occupied territory, if it results in death, can be prosecuted as "murder in violation of the laws and customs of warfare."

## Offenses against Belligerents

German and Japanese troops have violated many if not most of the laws and customs of war. Thousands of such instances have been and are being recorded by the American, Russian, Polish, Dutch, Norwegian, and other governments. Some of these records are already in print, and we shall draw a few typical examples from documents published by the nations concerned. These examples illustrate the scope of the atrocities which the Axis is charged with having committed. We may usefully begin with some cases relating to the violations of the duties of a belligerent toward enemy troops:

Paragraphs 32 and 33 of *Rules of Land Warfare* affirm that "it is especially forbidden . . . to kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion" and that "it is especially forbidden . . . to declare that no quarter will be given."

The Polish Ministry of Information, in a compilation of Nazi atrocities published in 1942, charges that "After the capitulation of the fortress of Modlin, heroically defended until the moment of the surrender of Warsaw, the Germans in one sector of the front mur-

dered a whole platoon of captured Polish soldiers. They ordered them to kneel down and raise their arms, then shot them all with machine-guns. Several Polish officers who had been seized, were also shot in the same way. Others were transported to Zakroczym, where they were placed against a wall and shot. On September 2 and 3, 1939, between Rybnik and Wadzim, in Silesia, the Germans captured a detachment of the 12th Infantry Regiment. They took no prisoners, but threw the men to the ground, and drove over their bodies with tanks." (*Black Book of Poland,* pp. 116–117.)

*Rules of Land Warfare* (paragraph 73, FM 27–10) declare that "prisoners of war are in the power of the enemy power, but not of the individuals or bodies of troops who capture them. They must at all times be treated with humanity and protected, particularly against acts of violence, insults, and public curiosity. Measures of reprisal against them are prohibited."

According to the representations of Secretary of State Cordell Hull to the Japanese government, as published in the *Bulletin* of the Department of State, February 12, 1944, the Japanese have savagely disregarded these rights of American and Filipino soldiers. "Prisoners of war who were marched from Bataan to San Fernando in April 1942 were brutally treated by Japanese guards. The guards clubbed prisoners who tried to get water, and one prisoner was hit on the head with a club for helping a fellow prisoner who had been knocked down by a Japanese army truck. A colonel who pointed to a can of salmon by the side of the road and asked for food for the prisoners was struck on the side of his head with the can by a Japanese officer. The colonel's face was cut open. Another colonel who had found a sympathetic Filipino with a cart was horsewhipped in the face for trying to give transportation to persons unable to walk. . . . An American Lieutenant Colonel was killed by a Japanese as he broke ranks to get a drink at a stream . . . Americans were . . . tortured and shot without trial at Cabanatuan in June or July 1942 because they endeavored to bring food into the camp. After being tied to a fence post inside the camp for two days they were shot."

*Rules of Land Warfare* (paragraph 86, FM 27–10) provide that "Belligerents shall be bound to take all sanitary measures necessary to assure the cleanliness and healthfulness of camps and to prevent epidemics. Prisoners of war shall have at their disposal, day and night, installations conforming to sanitary rules and constantly maintained in a state of cleanliness."

Conditions maintained by the Japanese in the prison camps were a far cry from this humane provision. "At Camp O'Donnell conditions were so bad that 2,200 Americans and more than 20,000 Filipinos are reliably reported to have died in the first few months of their detention. There is no doubt that a large number of these deaths could have been prevented had the Japanese authorities provided minimum medical care for the prisoners. The so-called hospital there was absolutely inadequate to meet the situation. Prisoners of war lay sick and naked on the floor, receiving no attention and too sick to move from their own excrement. The hospital was so overcrowded that Americans were laid on the ground outside in the heat of the blazing sun. The American doctors in the camp were given no medicine, and even had no water to wash the human waste from the bodies of the patients. Eventually, when quinine was issued, there was only enough properly to take care of ten cases of malaria, while thousands of prisoners were suffering from the disease. . . . It is reported that in the autumn of 1943 fifty percent of the American prisoners of war at Davao had a poor chance to live and that the detaining authorities had again cut the prisoners' food ration and had withdrawn all medical attention."

The code of warfare among civilized nations prohibits the imposition of "punishments other than those provided for the same acts for soldiers of the national armies . . . upon prisoners of war by the military authorities and courts of the detaining power." (Paragraph 119, FM 27–10.)

Yet, to quote Secretary Hull again, "American personnel have suffered death and imprisonment for participation in military operations. Death and long-term imprisonment have been imposed

for attempts to escape for which the maximum penalty under the Geneva Convention is thirty days arrest."

## Offenses against Civilians

The rules governing the treatment of civilians in time of war are as tolerant and forbearing as those relating to belligerents. When a territory is captured, "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all measures in his power to restore, and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." (Paragraph 282, FM 27–10.)

This safeguard for the welfare and property of civilians who happen to find themselves in occupied countries has been consistently ignored by the Axis armies. Indeed, it is doubtful whether in the entire history of man's cruelty to man there is anything which surpasses the butcheries of Jews, Poles, Russians, French, Italians, Greeks, and other peoples caught in the Nazi sweep across the European Continent. The acts of torture and murder of thousands of men, women, and children in their homes, streets, and barricaded ghettos, in death houses specially constructed for the use of live steam or gas fumes as a lethal weapon, of the forcing of victims to dig their own graves—these acts have been so numerous as to require many volumes to recount them.

For example, "In Lublin and the vicinity on the night of March 23 and 24, the Jewish population was simply driven out of their homes, and the sick and the infirm were killed on the spot. In the Jewish orphanage 108 children from the age of two to nine were taken outside the town together with their nurses and murdered. Altogether that night, 2,500 people were massacred and the remaining 2,600 Jews in Lublin were removed to the concentration camps at Belźec, and Trawniki. . . . Mass murders occurred on such a large scale at Rawa Ruska and Biłgoraj that Jewish communities

have ceased to exist. . . . In Mielec about 1,300 Jews were slaughtered on March 9; in Mir 2,000 Jews were killed; in Nowogródek, 2,500; in Wołozyn, 1,800; in Kajdanów 4,000 were killed. Thirty thousand Jews from Hamburg were deported to Mińsk where they were all murdered." (*Black Book of Poland,* p. 579.) Since these acts have not the remotest relation to warfare, they constitute ordinary murders in violation of the penal codes of most civilized states.

Not only have the Nazis shot people in systematic massacres and boasted of it, as in the razing of the Czech town of Lidice, but they have terrorized the inhabitants of occupied countries by seizing and murdering hostages for the slightest infraction of rules—many of them arbitrary and capricious—which they laid down.

According to *Rules of Land Warfare* (paragraph 343, FM 27–10), "No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of acts of individuals for which they cannot be regarded as jointly and severally responsible." Yet, as recorded in the *Black Book,* "People were hunted down in the town, on the pretext that an attempt had been made to fire at German soldiers from one of the houses. . . . About sixty people were seized and shot. One of the houses in the Street of The Blessed Virgin Mary was set on fire by the Germans, after they had thrown hand grenades into it. There were many persons inside. . . . It was forbidden to bury or to remove the bodies of those who had been shot, the object being to terrorize the inhabitants by the sight of these corpses. They were left unburied until two days later." (*Black Book of Poland,* p. 22.)

"As the German authorities had issued an order the previous day . . . that all arms were to be surrendered before 8 P.M., there was a general search for arms. In the Institute of the Order of the School Brothers, an old gun and several Scouts' caps were found in the theatre wardrobe. On the false pretext that they had been 'concealing arms,' two of the Friars and the father of another were taken out and shot in the barrack square of the 27th Infantry Regiment. Their bodies were buried in the barrack garden. Many persons were shot simply because toy pistols had been found in their

houses, or old sabres which had been forgotten among the lumber in attics." (*Black Book of Poland,* pp. 22–23.)

*Rules of Land Warfare* (paragraph 299, FM 27–10) order belligerents to respect "family honor and rights, the lives of persons." The Polish Ministry of Foreign Affairs charges, in the *Polish White Book,* issued in 1942, that "Under pretense of arresting prostitutes, patrols of German soldiers organized regular raids to carry off young women. A patrol of the 228th regiment of German infantry organized such a raid in one of the quarters by the river early in 1940. Soldiers of the 7th anti-aircraft regiment did the same thing twice in the suburb of Mokotow. Women were taken not only in the streets but also from their homes. These young unfortunates were carried off to the barracks of the German soldiers and raped." (Pp. 229–230.)

Other provisions of *Rules of Land Warfare* order belligerents to respect the "religious convictions and practice" of peoples in occupied territories, as well as to spare, as far as possible, "buildings dedicated to religion, art, science, or charitable purposes, historic monuments," and "places where the sick and wounded are collected, provided that they are not being used at the time for military purposes." Likewise "The property of municipalities, that of institutions dedicated to religion, charity, and education, the arts and sciences, even when State property" should be treated as private property, and all seizures of or destruction to such institutions, historic monuments, and works of art or science are prohibited. (Paragraphs 58, 299, 318, FM 27–10.)

In a volume of *Soviet War Documents,* published in 1943, the Soviet Embassy in Washington states that "Churches in Gzhatsk were turned into stables and warehouses. The Germans set up an abattoir for cattle in Blagoveshchensky Church. The Predtechenskaya Church and Kazan Cathedral were blown up. The wells in the town were poisoned and mined. In Sychevka, of 1,000 dwelling houses 770 were blown up or burned. The museum was burned. Over 5,000 paintings, including works by Repin, Levitan, Perov, Aivazovsky, Korovin and others; sculptures by Antokolsky; and

gold, silver and bronze articles by masters of the 17th, 18th and 19th Centuries perished in the fire. . . . The following were blown up or burned: three secondary and two primary schools, vocational schools . . . a library, a hospital, a restaurant, two children's homes, the water-pumping tower, the town polyclinic, the telegraph office, the radio station and other buildings." (Pp. 163–164.)

These are but a few examples of the many atrocities charged against the war criminals. Illustrations could be drawn from every occupied country in Europe and Asia. Who is liable for them? The commissioned officers who issue the orders for pillaging and sacking cities and murdering civilians? The political chieftains who set down the policies that are executed by the military commanders? The rank and file of the Axis armies who pull the triggers of guns that kill hostages, or carry the torches that set fire to buildings, or plant the dynamite that blows up schools, churches, libraries, museums? Is a soldier liable for crimes he is ordered to commit?

To try to answer these questions we must first go back and see what happened after the last World War and study the effort made to define war crimes and to punish war criminals.

## WHAT HAPPENED AFTER THE LAST WAR?

As we have seen, the Moscow Statement (which does not deal with the Japanese because Russia is not at war with Japan) proclaims that, after the armistice, the German war criminals will be returned to the scenes of their crimes for trial and punishment by local courts. In translating this declaration into action after the war, the United Nations may encounter some complex problems.

Let us, for example, see what was done after the last World War. What is the history of the action taken against war offenders under the Treaty of Versailles? On January 25, 1919 the Preliminary Peace Conference set up a Commission of Fifteen to study the violations of international law chargeable to Germany and her allies. The Commission's majority report declared that a belligerent may try enemy persons charged with violations of the laws and customs

of war, and for this purpose it may set up its own military or civil courts and use its own trial procedure. Most of the war crimes were therefore to be tried in the military tribunals or ordinary criminal courts of the injured nation.

The Commission declared, however, that four types of charges called for trial before an international tribunal: (1) offenses against civilians and soldiers of the Allied nations, such as outrages in prison camps; (2) offenses by "persons of authority . . . whose orders affected the conduct of operations" against the Allied armies; (3) offenses by civil or military authorities, "without distinction of rank," who either ordered or "abstained from preventing . . . violations of the laws or customs of war"; and (4) charges against sundry other persons, belonging to enemy countries, whom—having regard for the character of the offense or limitations of the law of the injured state—it might be advisable to prosecute in an international court.

For these four classes of cases, the Commission recommended that a "High Tribunal" be set up, the judges appointed by the Allied governments. This court could determine its own procedures and apply "the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience." Punishments could be imposed in accordance with what is customary "in any country represented on the tribunal or in the country of the convicted person."

## The Versailles Treaty

These recommendations of the Commission of Fifteen were, however, not adopted by the Peace Conference. Objections were raised, especially by the American and Japanese members of the Commission. The Americans disapproved of the creation of an international criminal court, "for which," they said, "a precedent is lacking, and which appears to be unknown in the practice of nations." They also rejected the doctrine that failure to prevent violations of the

laws and customs of war is a criminal act. The Americans and Japanese particularly disliked the idea that, if the Commission's recommendations were carried out, the head of a state, such as the Kaiser, could be brought before a court set up by his enemies.

And so, instead of following the majority views of the Commission of Fifteen, a milder approach toward war criminals was taken in the Treaty of Versailles. No provision was made for an international criminal court except that Article 227 provided for a "special tribunal" to try the former Kaiser. This tribunal was to be composed of five judges, one each to be appointed by the United States, Great Britain, France, Italy, and Japan. Since Holland refused to extradite him, the tribunal was never set up. By Article 228, however, the German government recognized the right of the Allies "to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war." The German government undertook to hand over the accused to the Allied governments.

Article 229 provided for the trial of the accused before military tribunals of the nations where their alleged crimes were committed. Every defendant was to be permitted to name his own counsel.

By Article 230 the German government undertook to furnish all the documents and data relevant to the trials.

## The Lists of Accused

Accordingly, lists of war criminals were made up by each of the principal Allied governments, from which a joint sample list of about 900 names was handed to the Germans on February 3, 1920. France demanded the surrender of 334 persons, among them the Crown Prince, Marshal von Hindenburg, Count Bismarck (grandson of the Iron Chancellor), and General Stenger, who was accused of having ordered his men to massacre all prisoners, including the wounded.

The British claimed 100 Germans, among them Grand Admiral von Tirpitz and Admiral Scheer, for having ordered submarines

ruthlessly to sink Allied ships, and some 20 former commandants of German prison camps, for extreme cruelty.

Belgium called for the delivery of 265 Germans, including ex-Chancellor von Bethmann-Hollweg, allegedly responsible for the violation of Belgium's neutrality. Poland, Romania, Italy, and Yugoslavia also demanded the surrender of many high-placed offenders—for murder, arson, theft, pillage, wanton destruction, bombardment of open towns, and similar offenses.

Although, in signing the Treaty of Versailles, the German government obligated itself to deliver up the accused, it soon refused to do so. In Germany, feeling ran high when the Allied list was published. Mass meetings of protest were held and everywhere the surrender of the war criminals was denounced.

On January 25, 1920—even before the list of 900 was presented—Germany had proposed, as a compromise, that all persons charged by the Allies with war crimes and misdemeanors should be tried before the Supreme Court of the *Reich* at Leipzig. As evidence of its determination to punish its own people, the German government declared that it had brought about the passage of a law on December 13, 1919 providing for the prosecution of war offenders.

After an exchange of many diplomatic notes, the Allies in May 1920 agreed to deliver to the Germans a sample list of 45 war criminals for trial at Leipzig. To this list the British contributed only 7 selected names.

## The Leipzig Trials

At last the trial of the war criminals began at Leipzig on May 23, 1921—two and a half years after the Armistice. The duty of trying their own countrymen fell upon the seven judges of the Criminal Senate of the German Imperial Court of Justice.

Many of the accused could allegedly not be found by the Germans. For example, the whereabouts of Commander Patzig—whose U-boat had torpedoed the British hospital ship *Llandovery Castle* without warning and had then fired upon and sunk lifeboats containing the survivors—was said to be unknown, although he had an

address in Danzig. His lieutenant commander could not be traced at all, while another officer had taken refuge in Poland. In connection with the *Llandovery Castle* atrocity only Lieutenants Ludwig Dithmar and John Boldt were put on trial—on the initiative of the German government.

Others who were tried included General Stenger, accused of ordering the massacre of prisoners, and Captain Emil Müller, charged with maintaining such bad conditions at his prison camp that hundreds of men died.

Altogether 12 men were tried at Leipzig—2 on German charges, 4 on British, 5 on French, and 1 on Belgian. Of these 12 men, 6 were convicted. The sentences imposed included: on German charges, 2 of four years; on British charges, 2 of six months and 1 of ten months; on French charges, 1 of two years. The French case involved a German major prosecuted for killing wounded French war prisoners, allegedly on General Stenger's orders. The General himself was acquitted despite much evidence against him by German witnesses. Crowds applauded his acquittal and admirers gave him flowers.

The Allied mission sent to Leipzig withdrew in protest against the outcome of the 12 cases. The French particularly were angered and saddened; they and the Belgians, who had suffered most from German atrocities, indignantly withdrew the documents of accusation and proof. To them, the trials were clearly a miscarriage of justice. On the other hand, certain prominent British observers thought that the German court had done a fairly good job under great handicaps.

After the Allied observers had left Leipzig, some 800 other cases of war crimes came to the attention of the German Court, but the German authorities disposed of all of them by discontinuing the proceedings, usually on the grounds of insufficient evidence.

In January 1922 a Commission of Allied Jurists, set up to inquire into the business, unanimously declared that it was useless to let the Leipzig court continue and recommended that the German government be compelled to hand over the accused persons for trial by

the Allies under Article 228 of the Versailles Treaty. German groups, however, organized protest meetings at which high-ranking German officers reminded the Allies that "250,000 soldiers and the police of the *Reichswehr*" were ready to prevent the handing over of Germans to the "justice of the Entente."

It is significant to note that of the 6 men convicted, the 2 with the longest terms soon escaped from the house of detention (not a prison) under suspicious circumstances. Thus ended the fiasco of bringing the German war criminals to trial.

## Lessons of Leipzig

What are the lessons learned from the Leipzig trials?

First, we cannot trust the enemy to bring his own nationals to justice.

Second, surrender of the leading malefactors might be made one of the conditions of the armistice at the end of World War II.

Third, the men accused of war crimes should be tried as soon as possible. Otherwise witnesses will almost certainly disappear or die off and evidence will be lost.

Fourth, most of the preparation for the trials should be handled by United Nations officials.

Fifth, fair yet not long-drawn-out proceedings should be held.

Sixth, public opinion in enemy countries should be prepared to recognize the justice of punishing leaders who are guilty of shocking crimes.

Finally, the Leipzig trials and their aftermath show that in the difficult business of dealing with war criminals the United Nations must be truly united and of one opinion. Disagreement among the Allies encouraged the Germans to resist the Allied demands for the criminals.

The Leipzig trials bring up certain legal questions which we need to consider here. Under what law, for instance, shall the United Nations proceed in dealing with war criminals? In what courts should they be tried? How shall a soldier's defense—that he com-

"I have repeatedly said that unconditional surrender gives the enemy no rights, but it relieves us from no duty. Justice will have to be done and retribution will fall upon the wicked and cruel. Miscreants who set out to subjugate first Europe and then the world must be punished. So must their agents who in so many countries have perpetrated horrible crimes. They must be brought to face the judgment of the populations they have outraged to the very scenes of their atrocities." (Prime Minister Churchill, May 25, 1944.)

mitted atrocities only in obedience to his superior's orders—be treated?

Can chiefs of state, like Hitler, be legally tried and punished? How shall the accused be got hold of and the guilty punished? What steps shall be taken now to ensure the successful application of justice at the end of the war?

Let us take up the first question first.

## UNDER WHAT LAWS SHALL THE UNITED NATIONS PROCEED?

Most international lawyers argue that the law of nations is binding only on sovereign states and not on individuals. In other words, the individual offender can be punished only under the law of his own or the injured nation. Furthermore, international lawyers are inclined to argue that when it comes to individuals who violate the laws and customs of warfare, international law—as, say, in the Hague conventions—provides neither courts nor punishments.

Yet, a good case can be made for the view that the common or customary law of nations does in fact permit the trial of individuals and does provide punishment—the death penalty. In the case of piracy this has long been so.

Violations of the laws and customs of legitimate warfare are the very kind, some authorities believe, for which individuals ought to be liable under the law of nations. Not only do soldiers of the Axis powers enjoy the protection of the laws of warfare when they fall into the hands of the United Nations, but these nations bring to trial and punish their own soldiers who violate the laws and customs of legitimate warfare or the principles of civilized criminal law. Why, then, should not enemy soldiers be tried and punished for similar offenses?

The German Supreme Court, during the Leipzig trials, had to acknowledge the fact that the law of nations was binding upon individuals. In the trial involving the *Llandovery Castle,* the court said: "The fact that his deed is a violation of international law must be well-known to the doer. . . . The rule . . . here involved is simple and is universally known. . . . The court must in this instance affirm [Commander] Patzig's guilt of killing contrary to international law."

Since World War I there have been adequate precedents and authority for a belligerent to punish, under its own laws, enemy violators of the laws and customs of war. Both German and American jurists agree that when a state wishes, as a matter of justice, to punish such an offender, the fact that it has not previously enacted a penal code to suit the crime is irrelevant. Thus, an American authority on international law, discussing the case of the saboteurs who were executed in 1942, declared that the decision which our Supreme Court affirmed "is impressive judicial testimony to the effect not only that the law of war . . . is a part of the local law, but also that its applicability by the courts . . . need not await precise legislative appraisal or definition."

It would indeed be a mockery of justice for an Axis officer to claim that because no specific code of *international* criminal law exists, he did not know that such actions as the slaughter or enslavement of innocent civilians, or the torture of prisoners are forbidden.

Should we be bound by the theory that only the state and not

also the soldier is liable for his violations of the laws of war? In answering this question it should be remembered that the typical remedies against a state (for example, protest through neutrals, the taking of measures of reprisal, and the imposition of a "fine" by way of postwar indemnity) have been shown by experience in both world wars to be unsatisfactory for making a lawless state respect the laws and customs of warfare. Action against individual offenders is far more effective.

## TRIAL BY LOCAL COURTS

The vast majority of war criminals will be dealt with as prescribed in the Moscow agreement; that is, they will be returned to the scenes of their crimes for trial and punishment by local courts and under local laws. If the legal system of the prosecuting state so provides, some enemy offenders may be tried in ordinary criminal courts for violating the domestic penal laws. But most of them will probably come before military tribunals for violation of the laws and customs of warfare. The recent trial at Kharkov, in which three German officers and a Russian traitor were convicted by a Soviet military court and hanged for atrocities, is an example of how war criminals of this class will be dealt with.

Since there has been no opportunity for the commission of Nazi or Fascist war crimes on American territory, there will presumably be no call that Germans, Italians, or other Axis nationals be "returned to the scene of their crimes" for trial in American courts. However, under the principle of the Moscow Statement, the United States will have a hand in the trial and punishment of Japanese war criminals whose offenses took place in Wake, Guam, the Philippine Islands, the Aleutians, and other Pacific areas.

There will also be charges of war crimes committed against Americans on European and Asiatic battle fronts. While the Moscow Statement does not make clear what will be done about such offenses, the United States will be entitled to have the deciding voice in the disposition of the accused. By the same token, once

having participated in the joint United Nations determination of who are the war criminals, and having helped in the distribution of the accused among the various victimized countries, the United States will have no voice in how those countries apply their own laws and legal procedures.

As we have seen, many atrocities have already been investigated and the accused listed by governmental commission and by the United Nations Commission for the Investigation of War Crimes, which has been sitting in London since the middle of 1943.

The Soviet government has set up numerous commissions to collect evidence of atrocities in recaptured parts of the USSR. These have already drawn up detailed accusations. The following is typical, covering the chief instigators of crimes as well as the soldiers who allegedly carried them out. "For the crimes committed in the city of Orel and the Orel Region; for the mass murders of guiltless peaceful residents; for the murders and tortures of wounded and sick war prisoners; for the plundering and abducting of Soviet citizens to German slavery; for the destruction of collective farms, villages and towns; for the looting of the properties of State, cooperative and public institutions—the Extraordinary State Committee holds responsible the commander of the Second German Tank Army, General Schmidt; the commander of the Orel administrative area and military commandant of the city, Major General Hamann, and also the direct executors of these monstrous crimes:

"The chief of the Orel camp for war prisoners, Major Hofmann; the assistant chief of the Orel war prisoners' camp, Captain Matern, the garrison doctor Ehrlich, the German doctor Schirmann; the German doctor at the war prisoners' camp, Kuper; chief of the 'labor exchange' Lowe . . . ; chief of the economic kommandatur Schmidt, chief of the camp of the 'labor exchange' Loch, Sergeant Majors Winkler, Stricke and Scholz and Corporal Diel. All of them must bear severe punishment for the monstrous crimes they have committed against the Soviet people during the temporary occupation by the German-fascist troops of the city of Orel and the Orel Region." (*Soviet War Documents,* pp. 185–186.)

## TRIAL BY INTERNATIONAL TRIBUNALS

While most war criminals will end up in the toils of local law-enforcement agencies, certain offenders and offenses call for trial by an *international* tribunal. The Moscow agreement evidently recognized this, for it affirmed that the declaration did not apply to "German criminals, whose offenses have no particular geographical localization and who will be punished by joint decision of the Allies." It may reasonably be assumed that the offenders covered by this provision are those responsible for the wholesale atrocities, such as Hitler, Tojo, members of their general staffs, political leaders, the Gestapo, fascist militia, and others. Their crimes have been carried out on an international scale and affect the interests of all civilized peoples in the maintenance of law and order on an international plane.

United action in these cases could be taken by a joint or mixed military tribunal, as provided in Article 229 of the Versailles Treaty, or by a new international criminal court.

To avoid confusion, the joint military tribunal, it has been suggested, might follow the procedure of the prosecuting state, that is, the state that took the initiative in filing charges against the individual. Its military law, whether English, American, Belgian, Chinese, Russian, Polish, or other, could be enforced by the joint court. The choice of the prosecuting state might be by agreement among the United Nations, depending upon such factors as which had suffered the greatest injury from the crime, whose law and procedure is the easiest to apply, and the like. The case might well be entitled *The United Nations* ex rel. *The United Kingdom* v. *Adolf Hitler;* or *The United Nations* ex rel. *The United States of America* v. *Hideki Tojo.*

If a true international criminal court is set up, it would embrace practically all the nations of the world. Thus it would be the agent of civilized humanity in general and would mainly apply the law of nations. How would it proceed? An international criminal court could apply (1) a penal code covering crimes against the family

of nations, or (2) the common law of nations supplemented by the Hague and Geneva conventions referred to on page 5 and the principles underlying and common to most civilized systems of penal law.

Since the first code does not yet exist, the question arises whether such a court could lawfully carry on its work. Although some authorities do not think that it could, it seems, to others, legitimate to conclude that if the United Nations (and other states who may wish to join) enter into an agreement to establish an international court, they could assign to it their recognized individual powers to try war offenders, and the court would be enforcing law commonly recognized. This court could, therefore, begin to function without the prior enactment of an international penal code. But some guidance would nevertheless have to be given the court—as was done in the case of the World Court established at the Hague after the last World War—as to the sources of the law it would apply. It might derive its law from (1) international conventions, expressly recognized by the nations involved; (2) international custom as evidence of a general practice accepted as law; (3) the general principles of law (particularly criminal law) recognized by civilized nations; and (4) judicial decisions and the teaching of the best authorities of the various nations.

These sources of law would take account of legitimate defenses and mitigating circumstances, such as insanity, self-defense, killing by order of an official or a court, killing in lawful battle, and the like. Punishment would be meted out according to the seriousness of the crime, as under civilized law—that is, murder would be punishable by death or life imprisonment, other crimes by terms of years. There would be lesser penalties, doubtless, such as fines or loss of civil rights. Practically all legal systems include elements of fair play which would guarantee the accused adequate counsel and a chance to be heard in self-defense.

It is reasonable to conclude, then, that a detailed international penal code would not have to be enacted by agreement of all the civilized nations of the world before the international tribunal goes

to work. Such a code would be, in essence, only declaratory of legal principles already in existence.

### How Would This Court Be Staffed?

The chief statesmen of the United Nations might nominate the judges from among those jurists who are acknowledged authorities on criminal law. The prosecuting staff, as well as public defenders, might be nominated from panels submitted by the chief executives of the countries establishing the court. Procedure might consist of the best features of Anglo-American and Continental criminal proceedings. Rules of evidence could be simple. Appeal to a higher or appellate branch of the court might be only sparingly provided for in order to avoid unreasonable manipulation of the processes of justice. This sketch of the manner in which the war criminals might be tried by the United Nations leaves some basic legal questions unanswered: Can an accused member of the Axis nations plead that he was following the orders of a superior when he committed an atrocity? And are chiefs of state liable to prosecution in foreign courts for their crimes?

## ARE "SUPERIOR ORDERS" A LEGITIMATE DEFENSE?

One of the most difficult problems to be faced in trying war criminals is that of determining the guilt of men who claim that they were acting under orders of their superior—that they did not commit offenses of their own free will.

You will find in paragraph 347 of the *Rules of Land Warfare* the following statement: "Individuals of the armed forces will not be punished for these offenses [*violations of the customs and laws of war*] in case they are committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall."

Notice that under this rule the ordinary soldier is excused but his commander or government is liable. If this rule is continued it will not be easy to get at the guilty "commander." Is he the lieutenant who orders a squad of soldiers to machine gun innocent hostages? Or the captain who issued the order to the lieutenant? Or the major? Or the colonel? Or the general from whom the original command came? One can climb higher and higher until only the chief of state—Hitler or Tojo—is reached, and he, according to many authorities, cannot be tried at all!

The question is being raised whether the rule as to superior orders should not be changed. It should be noted that it did not enter the American *Rules* until 1914. Before that, the *Rules* failed to mention "superior orders," and American courts martial upheld the principle that a soldier obeying his commander's orders is not protected if the order is unlawful.

Admittedly, the ordinary soldier is in a tough spot. Ordered to commit an abominable deed, he may or may not know that under the laws of civilized warfare it is unlawful. Even if he knows that he is committing an atrocity, it seems hard to hold him responsible, since all his military training has stressed instant and unquestioning obedience.

What is the average Nazi or Japanese soldier's choice? He can defy a shocking command and be disciplined—perhaps shot on the spot—or obey it and later be charged by the United Nations with murder in violation of the customs and laws of war.

This situation is illustrated by a German officer of the last war. Accused of atrocities in a Belgian village, he replied, "Yes, I know it was contrary to the law of nations, for I am a doctor of law. I did not wish to do it, but I did it in obedience to the formal order of the Governor General of Brussels."

On the other hand, the American Articles of War protect a soldier or officer who disobeys an obviously unlawful command.

Every Nazi soldier or member of the Gestapo knows, when commanded to electrocute or gas civilians or prisoners of war, that he is perpetrating a foul deed. If he is strongly indoctrinated with

perverted ideas of morality, he may even commit the crime willingly. Should he be protected by claiming obedience to a superior's order?

To get to the bottom of this dilemma, let us examine American, British, and German thinking on the subject, as reflected in court decisions growing out of actual cases.

## An Early Precedent

One of the most famous precedents on the subject of a superior's orders is the "Maxwell Case" dating from the Napoleonic Wars. French prisoners in a Scottish jail had neglected to extinguish a light in their cell window when ordered to do so by a guard. This guard, under the direct orders of Ensign Maxwell, fired at the light, killing one of the prisoners. Maxwell was tried and convicted of murder by the High Court of Justiciary of Scotland. His plea that he was acting under orders of higher officers was rejected. The court declared that "every officer has a discretion to *disobey* orders against the known laws of the land."

## The American View

A famous American case is that of *Mitchell* v. *Harmony,* a civil suit growing out of the Mexican War. An American Army officer in Mexico illegally seized the goods of a trader in occupied territory. When later sued for the price of the goods, he claimed to have acted under orders of a superior officer. The court refused to consider this plea. Chief Justice Taney of the United States Supreme Court declared: "It can never be maintained that a military officer can justify himself for doing an *unlawful* act by producing the order of his superior. The order may *palliate,* but it cannot justify" the deed.

In another well-known American case, *The United States* v. *John Jones,* some members of the crew of an American privateer were tried because, during the War of 1812, they stopped and searched

a neutral Portuguese vessel on the high seas, assaulted the captain and crew, and stole valuables. They were held guilty of the act. With reference to the defense of Jones and the others that they had only obeyed their captain's orders, the Justice said: "This doctrine, . . . alarming and unfounded, is repugnant to reason, and to the positive law of the land. No military or civil officer can command an inferior to violate the laws of his country; nor will such command excuse, much less justify the act. Can it be for a moment pretended, that the general of an army, or the commander of a ship of war, can order one of his men to commit murder or felony? Certainly not."

In some later American decisions, however, there is a tendency to stress the military point of view. The absolute rule which holds the soldier responsible if the order turns out in fact to have been unlawful is qualified in these decisions. They tend to grant immunity if the soldier obeyed an order which was not "palpably" illegal. Whatever may be the practice in military tribunals, it cannot be said that the true American judicial rule has as yet been definitely settled.

## The English View

Under English law a soldier has a somewhat more favorable position than under most American decisions.

A leading case in English legal history is that of *Regina* v. *Smith*. During the Boer War a patrol of British soldiers, sent out on a dangerous mission, had an argument with a native who hesitated to find a bridle for them. Smith, one of the soldiers, under orders of his superiors, killed the native on the spot. After the war, a special court tried Smith for murder and acquitted him. The court said, "I think it is a safe rule to lay down that if a soldier believes he is doing his duty in obeying commands of his superior, and if the orders are not so manifestly illegal that he must or ought to have known they were unlawful, the private soldier would be protected by the orders of his superior officer."

## The German View

In the *Llandovery Castle* case the submarine officers Dithmar and Boldt claimed that they were carrying out their superior's command to sink the lifeboats. The German Supreme Court turned a deaf ear to their plea and declared, "Military subordinates are under no obligation to question the order of their superior officers, and they can count upon its legality. But no such confidence can be held to exist if such an order is universally known to everybody, including also the accused, to be without any doubt whatever against the law. . . . They should, therefore, have refused to obey. As they did not do so, they must be punished."

## A Suggested Rule

What seems to be needed, according to some students of the problem, is a rule that will serve as a check upon extreme brutality and at the same time take account of the soldier's peculiar position "between the devil and the deep blue sea."

The following rule has been suggested for adoption by an international criminal court as most nearly meeting these requirements (assuming, of course, that it is supplemented by a sound sentencing policy): The act of a soldier in obedience to a military order of his superior is not justifiable if, when he committed it, he either actually knew or, under the circumstances, had reasonable grounds for knowing that the act ordered is illegal either under the laws and customs of warfare or under the criminal law of his country; and when the two systems clash, the former shall prevail.

The final proviso is included because otherwise the most lawless nations could easily whitewash their soldiers for the most flagrant violations of the law of nations by simply declaring their acts, if done against the enemy, to be always lawful under their own law. Normally, the law to be applied in order to determine the illegality of the order that resulted in atrocities would have to be the law of the accused man's country. He could not be expected to know the law of the enemy nation that prosecutes him. However, the laws

and customs of war, as well as the ordinary principles of criminal law, are generally known and applicable in Germany, Japan, and other Axis countries. Incidentally, a non-German court can legitimately ignore some of the Nazi legislation—such as that which denies legal status to Jews and other "non-Aryans"—because it is so contrary to the elementary principles of justice and fair play. While a sovereign nation is free to adopt any legislation it sees fit, the family of civilized nations is not bound to recognize the erratic Nazi laws.

A rule such as that described above can avoid harsh results if the sentencing procedure after conviction makes allowances for the rank of the accused and if his punishment is lessened in certain circumstances, such as the following: he was not entirely a free agent; there was no way for him to know definitely that he was violating the laws and customs of legitimate warfare; the illegal order was obeyed under stress, at a period of great danger, during hostilities, or the like; the command required instant obedience in carrying out an act that could not be postponed.

If these considerations were applied, many ordinary soldiers would get off with nominal or slight punishment, while officers who had more knowledge of the law and greater freedom of action would be punished more severely. The defense of superior orders and supplementary leniency should, however, perhaps not apply to the various private Nazi militias, such as the Elite Guards and Storm Troopers. Even if it should turn out that they had been made part of the German army by law or decree, they clearly do not deserve the usual protection accorded to soldiers. They originated as private volunteer corps, and at least in a general way their members knew when they enlisted of the crimes that were expected of them.

## ARE CHIEFS OF STATE LIABLE?

After the last war, one of the major questions in dealing with war criminals was the responsibility of chiefs of state—particularly the Kaiser—for the atrocities committed by their subjects.

Article 227 of the Versailles Treaty charged the former Emperor William II "with a supreme offense against international morality and the sanctity of treaties." The Allies wanted to put the Kaiser on trial, but he had renounced the throne shortly before the Armistice and fled to Holland. The Dutch refused to give him up.

Will the same thing happen to Hitler or Tojo or their henchmen? Indeed, what is the status, under the law of nations, of a chief of state? Is Hitler—the *Führer* in whose name and upon whose authority so many of the Nazi crimes have been committed—to be pursued "to the ends of the earth," as the Moscow Statement says, and brought to trial?

After the last war, not all authorities agreed that chiefs of state were punishable as war criminals.

The French accused the Kaiser of being fundamentally responsible for the atrocities committed by the generals and others under him. "It was necessary," they said, "to go beyond the individual, the actual author of the act complained of; it was necessary to search for the chiefs; from chief to chief. . . . In the German Army there is one supreme chief, the Emperor. Let us know, for example, whether the act of General Stenger, who was accused of having issued a proclamation ordering his troops to give no quarter, was ever disavowed. We do not know whether it was so or not; but it is certain that this proclamation reached the ears of the Kaiser and it is he who is responsible." The Kaiser, of course, "did not give directly all the barbarous orders issued by his generals, but the latter knew that their acts had his approval; they were only the executors, high or low, of measures decreed by their master who felicitated, decorated, or promoted those who distinguished themselves by their ferocity."

So argued the French. The American members of the Commission of Responsibilities thought differently. They "admitted that from the moral point of view the head of a state, be he termed emperor, king or chief executive, is responsible to mankind, but . . . from the legal point they expressed themselves as unable to see . . . that the head of a state exercising sovereign rights is responsible to

any but those who have confided those rights to him by consent, express or implied." According to this view, the heads of states are responsible only to their people and should not be made responsible to any other nation.

In the light of subsequent events some people challenge this American opinion and endorse the French view for the following reasons: The immunity granted a chief of state by other nations has nothing to do with the immunity he may enjoy inside his own country. It is based only on international courtesy, and this courtesy depends on whether the sovereign in question conducted himself as a law-abiding and trustworthy chief of state. By invading neighboring countries, by violating treaties, and by exterminating masses of human beings without cause, a sovereign loses, according to those who hold this view, any immunity he might claim under international law.

Unless the doctrine of immunity is so interpreted, it is argued, the most brutal and aggressive ruler would always be protected. If he won the war, he would not only escape punishment but deal roughly with the losers. If he lost it, he would always be sure to save his own skin. Since prisoners of war are subject to trial for violating the laws and customs of war, why should rulers who can be made prisoners of war get away scot-free? Moreover, would it be just to punish underlings who were forced to carry out illegal orders and yet spare the leader who deliberately planned and ordered wholesale atrocities?

It seems to many people that the Allies made a serious mistake at the end of the last war by not formally accusing the ex-Kaiser of the crimes of murder, robbery, kidnaping, and the like. Had they done so, Holland's legal position for refusing to extradite William II on the ground that he was only a political refugee would have been far less secure.

To set an example of fair and just proceedings the United Nations must, it seems to many students of the problem, subject Hitler and other Axis chiefs of state to trial by an international criminal court.

What Lord Birkenhead, attorney general of England, said of the Kaiser might be said of Hitler: "If this man escapes, common people will say everywhere that he has escaped because he is an Emperor [*chief of state*]. In my judgment they will be right. . . . It is not desirable that such things should be said, especially in these days. It is necessary for all time to teach the lesson that failure is not the only risk which a man possessing at the moment in any country despotic powers, and taking the awful decision between Peace and War, has to fear. . . . If ever again that decision should be . . . at the disposition of an individual, let the ruler who decides upon war know that he is gambling, amongst other hazards, with his own personal safety."

## GETTING HOLD OF THE ACCUSED

Determining how, and where, and by what laws to try the war offenders represents one group of problems. Getting hold of the accused is another.

In the Armistice that concluded the last World War, the Allies agreed not to prosecute the war criminals found in occupied Germany until the peace treaty came into force. This proved to be a mistake which probably will not be repeated. The known malefactors this time will doubtless be seized promptly and put on trial without delay.

War criminals caught by United Nations forces on non-German soil will, under the Moscow Statement of November 1, 1943, be held for international prosecution or turned over for trial to the authorities of those countries where their atrocities were committed. In this connection the United Nations should have little difficulty in exchanging offenders among each other. The tedious technical process of extradition will not be necessary if a satisfactory agreement is made beforehand.

So also, the offenders taken inside Germany will be turned over, perhaps, as part of the surrender terms, to the proper national tribunals or detained for trial jointly by the United Nations.

## The Right to Give Asylum

One of the most perplexing tasks in rounding up the accused after the war will be to get hold of those major offenders who will have fled—by plane, submarine, ship, or otherwise—to some neutral country, where they will do everything possible to resist extradition. We can be sure that many Japanese and Nazi chieftains have deposited vast sums of money in neutral countries with which they could hire expensive counsel and attempt to bribe officials, hoping, like the Kaiser, to live out their days in peace and plenty.

To prevent this very occurrence, President Roosevelt on July 3, 1943 warned all the neutral nations that: "One day Hitler and his gang and Tojo and his gang will be trying to escape from their countries. I find it difficult to believe that any neutral country would give asylum to or extend protection to any of them. I can only say that . . . the United States Government hopes that no neutral government will permit its territory to be used as a place of refuge or otherwise assist such persons in any effort to escape their just deserts."

This warning was supported by Great Britain and a similar note was sent by the Soviet Union to Turkey and Sweden.

By the summer of 1944 few neutrals remained—those still so considered were Argentina, Eire, Portugal, Spain, Switzerland, Sweden, Turkey, and the Vatican City. The government of Switzerland took notice of President Roosevelt's warning with the remark that it would "obviously exercise its rights of asylum in a manner to assure fully the sovereignty and highest interests of the country." The Argentine government noted that asylum "can be granted only for political motives or crimes," and that only the government granting asylum can determine what is or is not a political offense.

## Plugging Up the Loopholes

In view of Switzerland's and Argentina's responses, it is reasonable to expect some difficulties in getting war criminals

extradited from neutral countries. The Kaiser avoided trial because Holland regarded him as a political refugee, not a war criminal.

The loopholes in existing extradition treaties might, therefore, be plugged up beforehand, as the London Commission on War Criminals (of the International Assembly, League of Nations Union) has suggested: "A separate and temporary agreement [should be made by the United Nations] with the neutral countries, concerning only war criminals. Without modifying anything in the existing extradition treaties, those countries should, *during a limited period,* after the war, be asked to undertake to deliver to the United Nations all persons accused of such war crimes. The list of those crimes should of course be drafted, and a new word, such as 'delivery,' should be used in this respect to avoid confusion with ordinary extradition. In the agreement it should be specified . . . that the traditional custom of refusing extradition when the crime was of a political nature does not apply to delivery; that delivery will take place even if exemption from punishment has been acquired by lapse of time; that the circumstance that the crime for which delivery is demanded is punishable by death shall not be a reason for refusing it; that the circumstance that the accused alleges to have committed the crime by order of his superior will not be a reason for refusing delivery."

It remains to be seen, first, whether the neutral countries who are proud of their ancient rights of asylum—like Switzerland—will sign such an agreement as the commission proposed, and second, whether, if the agreements are signed, we can get hold of the wily war criminals, who will scurry to all ends of the earth and use all their cunning to avoid falling into the United Nations hands. An influential Swiss newspaper recently said, while taking the stand that "granting sanctuary" is Switzerland's own business, "Let us hope that no one in Switzerland will be in favor of sanctuary being granted to those having to answer for war crimes." And a Swedish newspaper wrote in 1943 that "If pyromaniacs, murderers, and thieves succeed in coming to power in a country, they cannot escape

punishment by crossing the frontier into another country when their time is up."

Meanwhile it is widely recognized that no time should be lost by all the United Nations in preparing lists of accused malefactors and collecting evidence, as the Soviet, Polish, Norwegian, and other governments are doing. In order to close the avenues of escape, public opinion in neutral countries could be prepared to accept the demands that will be placed upon them after the war if the accused seek sanctuary on their soil. The peoples who have suffered from the Axis atrocities may not be willing to let the offenders live serenely and happily on neutral ground and die peacefully of old age as the ex-Kaiser did in his castle at Doorn.

## HOW SHALL THE GUILTY BE PUNISHED?

Many people believe that the United Nations, either individually or jointly, should dispose of all Axis war criminals by shooting or hanging. A little reflection, however, shows that this solution of the problem, though simple, might be contrary to the best interests of the peoples who have suffered from the Axis cruelties. Apart from this, the question has been raised whether capital punishment for most of the guilty is in harmony with scientific criminology and penology.

In the United States we regard every offender as an individual. His assets and liabilities are studied and a program is planned to make the most of his abilities, develop new ones, curb his bad habits, and gradually restore him to a useful and law-abiding place in society. Should this policy be followed for the war criminals?

This is a difficult question to answer. For ordinary offenders, society can afford to experiment with the humane approach, and the public, even the victims and their families, can be made to agree to a policy of rehabilitation. In the case of war offenders of the Axis type, who have committed thousands of shocking atrocities, measures of cure and rehabilitation of the individual offender according to his needs would be interpreted (especially

by the surviving victims of Axis brutality) as undeserved leniency. In the end, doubtless, the laws of every country where the war criminals are tried will determine the type of punishment.

If the chiefs of state and their henchmen are tried by an international criminal court, it should be remembered that such an organ of justice does not have its own prison establishment or psychiatric and reformatory institutions. It would have to create its own bureau of punishment and correction; make arrangements for housing, feeding, and giving work to prisoners; keep track of their progress; and consider applications for parole.

If the feelings of the occupied countries are taken into account, however, death would be the punishment for all the leading Nazi and Japanese offenders. This would of course solve the problem of providing prisons and other places of detention. On the other hand, it is argued by some that, for political and economic reasons and to avoid creating "martyrs," it might be wiser to impose sentences of death on certain leaders and then commute them to prison terms at hard labor for life, perhaps on lonely islands in distant seas, whence escape would be impossible. The example of Napoleon banished to the island of St. Helena is mentioned as a precedent.

In the case of many prominent Axis criminals it is perhaps useless to attempt correction and rehabilitation. They could be studied by psychiatric clinics, however, so that we might learn what made these men defy the laws of civilization and lead millions of their fellow countrymen to an orgy of death and destruction. We might learn a great deal about international gangsterism if we knew what made these men tick.

For the younger offenders reeducation and rehabilitation might be prescribed with a view to helping them to shed the horrible Nazi and Japanese doctrines and gradually become good citizens.

It is generally agreed that the United Nations should force Germany, Japan, and their satellites to pay the expenses of the trials and the cost of detaining, correcting, and rehabilitating the war criminals. Before the war ends the United Nations Commission on

War Criminals will probably work out policy agreements among the governments concerned for (1) the classification of offenders; (2) the use of penal and correctional facilities by the proposed international court; (3) employment of prison labor in the devastated areas; and (4) other measures that will be necessary for carrying out the verdicts of courts of law.

## TO THE LEADER

The "War Criminals" problem will face us again at the close of this war as it did in 1918. The Moscow Statement quoted at the beginning of the text lays down general principles. Working out ways of implementing these principles presents many knotty questions, but they are questions which are sure to be of interest to G. I. discussion groups.

This pamphlet is so organized as to be an eminently practical guide to you in conducting one or more discussions on the "War Criminals" problem. Use this material for forum, panel discussion, informal discussion, or debate—whichever method is likely to be successful with your men. The techniques of all these types of meetings are outlined in EM 1, *G. I. Roundtable: Guide for Discussion Leaders.* The forum requires a good speaker who can address his audience with authority. An informal discussion will be

successful with a relatively small group (30 people or less) under the guidance of a leader who can keep the discussion on the track. Panel discussion requires about a half dozen individuals who will prepare themselves to carry on their orderly talk under a chairman and who can attempt to answer questions from the floor. Debate is an interesting form because it is a team competition; its disadvantage is that time for questions after the debate is difficult to arrange.

Whatever form of meeting you select, the table of contents indicates the major issues to be discussed. Scattered through the text are many subsidiary questions. You can make notes of these for your guidance in conducting the discussion. If the subject is to be properly covered within the time allotted, you are advised to plan some scheme for apportioning the hour between your short introduction and the major points it is necessary to have considered by the group.

Material in this pamphlet can easily be used for two meetings. It is suggested that you divide the major points for discussion as follows:

**First Meeting**

1. Who Are the "War Criminals"? (Pp. 2–5.)
2. What Happened after the Last War? (Pp. 13–19.)
3. Under What Laws Shall the United Nations Proceed? (Pp. 19–27.)

**Second Meeting**

4. Are "Superior Orders" a Legitimate Defense? (Pp. 27–32.)
5. Are Chiefs of State Liable? (Pp. 32–35.)
6. How Can the Accused Be Brought to Trial? (Pp. 35–38.)
7. How Shall the Guilty Be Punished? (Pp. 38–40.)

A single meeting can also be planned to cover all seven points above. In this case you can perhaps include points 1 and 2 in a brief introductory talk and limit the general discussion to the last five points.

*Chart.* You will find a rough chart which lists the major issues

a valuable aid in keeping the discussion from wandering too far afield. Be sure to have your lettering sufficiently large to be legible by all present.

Other questions for discussion are suggested below. You may wish to use them instead of or in addition to those suggested in the text. You may find in them suggestions for further discussion.

1. Should we "forgive and forget," and not subject the enemy leaders and members of their military and political staffs to punishment? Would you distinguish between the Germans and Japanese in this respect?

2. Should we distinguish between the leaders and the followers? If so, where shall we draw the line? Shall we limit trial to Hitler, Mussolini, Tojo, and their henchmen? Shall we also subject to trial and punishment members of the German and Japanese general staffs who violated the laws and customs of legitimate warfare and civilized criminal law? Shall we include the leaders of the political secret police organizations?

3. When it was suggested to a prominent international lawyer that heads of state are liable to trial and punishment by an international tribunal, he asked whether Americans and Englishmen would accept the view that their own chiefs of state could be tried by foreign courts. What do you say to this question? Would the trial and execution of Hitler establish a "dangerous precedent" for the future? If trials are in an international tribunal, should it include some judges from enemy countries? Should it hear charges against other soldiers?

4. If Hitler, Tojo, and Mussolini are executed, how can their "martyrization" by future generations of Germans, Japanese, and Italians be prevented?

5. What about the defense of "superior orders"? Compare the American rule as found in the *Rules of Land Warfare,* the American rule enunciated in judicial decision, the English rule, the German, and the French.

6. Do you think an international criminal court should be established?

7. If one is established should it confine its trials to the classes of cases suggested in this pamphlet? If not, how should the court's jurisdiction be modified?

8. What do you think of the Germans' contention at the close of World War I that trial by a court established by the Allies would be one-sided and unfair?

9. Do you think we ought to let German and Japanese war criminals be tried and punished in their own countries, by their own courts, and under their own laws?

10. Should Hitler, Mussolini, Tojo, and the other leaders be shot without trial, on the ground that their guilt is notorious and that trials would only give them a public forum for their antisocial views?

11. Should capital punishment be used in the more serious cases? Are you in favor of or opposed to capital punishment for murders committed in your own state? Are you consistent in your attitude? Is there a basic distinction between the problem of punishing war criminals and that of punishing ordinary criminals?

12. Most modern American criminology is opposed to punishment as an end in itself or as vengeance or retribution. It believes that the chief aim of "punishment" is reeducation, reform, and rehabilitation of the offender. Do you believe in such an approach to the problem? If so, how can you reconcile it with the proposal to punish war criminals as an end in itself or by way of retribution or vengeance?

*On page 44 there is a short list of books suggested for further reading if it so happens that you have access to them. The books are not approved nor officially supplied by the War Department. They have been selected because they give additional information and represent different points of view.*

# SUGGESTIONS FOR FURTHER READING

WAR CRIMINALS AND PUNISHMENT. By George Creel. Published by Robert M. McBride and Company, 116 East 16th Street, New York 3, N. Y. (1944).

PUNISHMENT OF OFFENDERS AGAINST THE LAWS AND CUSTOMS OF WAR. An article by James W. Garner in *American Journal of International Law,* vol. 14, pages 70-94, January and April 1920.

TRIAL AND PUNISHMENT OF THE AXIS WAR CRIMINALS. An article by Sheldon Glueck in *Free World,* vol. 4, pages 138-146, November 1942.

PUNISHING THE WAR CRIMINALS. An article by Sheldon Glueck in *New Republic,* vol. 109, pages 706-709, Nov. 22, 1943.

PROSECUTION AND PUNISHMENT OF WAR CRIMINALS. By Sheldon Glueck. To be published in the fall of 1944 by Alfred A. Knopf, 501 Madison Avenue, New York 22, N. Y.

WAR GUILT TRIALS. By Harold Kellock. Vol. 1, no. 11, of *Editorial Research Reports,* 1013 Thirteenth Street, N.W., Washington 5, D. C. (1943).

INTERNATIONAL LAW AND TOTALITARIAN LAWLESSNESS. By Georg Schwarzenberger. Distributed by Thomas Nelson and Sons, 385 Madison Avenue, New York, N. Y. (1943).

—U. S. GOVERNMENT PRINTING OFFICE: 1945

For sale by the Superintendent of Documents, U. S. Government Printing Office
Washington 25, D. C.